No. ---8815

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCES HILL, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

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CITATIONS

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STATEMENT OF FACTS

This suit was brought on a contract of war risk term insurance issued to plaintiff during her military service from March 28, 1918, to February 3, 1919. The policy, in force to August 1, 1919, was alleged to have matured by total permanent disability on the date of the plaintiff's discharge from service.

The only issue presented in the trial court was raised by defendant's denial that the plaintiff became totally permanently disabled during the life of the contract. After all the evidence had been

introduced, defendant's motion for a directed verdict on the ground that there was no substantial evidence to support a verdict for the plaintiff was denied, and an exception reserved. Thereafter, the jury returned a verdict for the plaintiff, finding that she became totally permanently disabled on January 1, 1919 (R. 322), and, in accordance therewith, judgment in her favor was entered on December 18, 1936 (R. 22–24).

Defendant's petition for appeal (R. 336) and assignments of error (R. 338–339) were filed, and appeal allowed (R. 340) on March 16, 1937. The bill of exceptions was settled on February 26, 1938, within the judgment term as extended for that purpose by special orders of court (R. 323–324).

QUESTION PRESENTED

Whether there was substantial evidence that the plaintiff became totally permanently disabled during the life of the war risk term insurance contract.

ASSIGNMENTS OF ERROR (R. 338–339)

The foregoing question is raised by assignments of error Nos. I and II, as follows:

I

> That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence, on the ground that plaintiff failed to prove by substantial evidence that she became permanently and

totally disabled on or prior to midnight of August 31, 1919, during the life of her contract of insurance.

II

That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence and submitting the facts to the jury for its determination, in that plaintiff failed to sustain the burden of proof by a fair preponderance of the evidence.

SUMMARY OF THE EVIDENCE

The plaintiff, a trained nurse twenty-four years of age, entered the military service May 28, 1918 (R. 26). She was assigned to a hospital in Liverpool, England. In October and November 1918, she was ill with influenza (R. 62), and either acute bronchitis (R. 62) or bronchial pneumonia (R. 28, 66). She was treated from October 2 to 10 and November 1 to 12, 1918 (R. 62), and then resumed duty for a short period. She returned to the United States in December 1918, and was given an eighteen-day furlough prior to her discharge on February 3, 1919. She testified that she felt "pretty good" when she first resumed duty, but was ill on the voyage to the United States and during the leave of absence granted prior to her final separation from service (R. 30, 31).

Upon examination prior to separation from service the plaintiff complained of pain in her left lung

(R. 63), although no disability was disclosed by examination at that time (R. 64).

The medical evidence of the condition of the plaintiff's health subsequent to her discharge from service consisted of the reports of twenty-six physical examinations dated periodically from December 1919 until November 1931 (R. 289–311), and the testimony of several physicians.

The examination reports show diagnoses of pulmonary tuberculosis, arrested. Activity was suspected by one examiner on August 16, 1920 (R. 291–292). However, two months of hospital observation immediately following resulted in the following certification by the examining physician on October 21, 1920:

> This is to certify that Miss Frances Hill, now a patient in this Hospital, is an arrested case of Pulmonary Tuberculosis, and physically able to accept vocational training (R. 293).

Except for the single possible exception indicated above, the numerous medical reports disclose that the plaintiff's tuberculosis was arrested at the time of the examinations to which the reports related. On November 31, 1923, a Board of Three Doctors examined the plaintiff and reported that "If this patient ever had pulmonary tuberculosis it has left no positive signs" (R. 302).

Dr. Wheeler testified that when he examined the plaintiff in the spring of 1923, he thought her tuberculosis was active (R. 122), and Dr. Cohn diag-

nosed the case as active tuberculosis in 1929 and 1935, but testified that the condition was quiescent when he examined her in 1936 (R. 133).

None of the eighteen medical examinations of the plaintiff (reports of which were contemporaneously made and preserved) from December 1919 to February 1924 (R. 289–302) revealed any heart disability. As least seven of these reports specifically recited findings that the heart was normal. An examination made on August 17, 1926 revealed a condition characterized by the examining doctor as "Probably a 'nervous heart'" (R. 304). On April 25, 1927, Dr. Palmer found the plaintiff's heart to be normal and operated upon her for removal of her gall bladder and appendix, administering a general anesthetic (ether) (R. 274–275). The plaintiff recovered from the operation in a very satisfactory manner, and was released from the hospital at the expiration of six days (R. 275). Reports of examinations made in 1931 described plaintiff's heart condition as tachycardia, simple, and chronic aoritis, well compensated (R. 308–309, 311).

Dr. Wolfsohn, who treated the plaintiff during her military service, examined her again in 1935, at which time, he testified, he found a pulmonary condition, heart murmurs, and dilation. From history received from the plaintiff, he testified to an opinion that the pulmonary condition resulted from her illness in 1918, but declined to express an

opinion either as to the degree of disability resulting from the heart trouble, or the probable date of its inception (R. 68, 69).

Dr. Duncan examined the plaintiff in September 1923, prior to her entrance upon duty in the United States Civil Service, for the purpose of ascertaining whether she had any disability at that time. He considered her to be free from disability. Although he was given a history of active tuberculosis, he deemed that condition to be arrested, and despite the fact that he was called as a witness for the plaintiff, neither his testimony nor the report of his examination make any reference to a heart disability (R. 128).

Dr. Sharp testified that when he examined the plaintiff in El Paso, Texas, in February 1919[1] (1920), "She had, as I recall it, myocarditis and a heart condition aortitis, an inflamatory condition of the aorta" (R. 106). This, in substance, was the same finding made upon his examination of the plaintiff in 1935 (R. 107). As to the examination made in 1920, he further testified:

> * * * well, as I stated before (this is all from memory of the case) I recall she had a general breakdown at that time as a result of her condition and this other situation (strenuous work nursing a serious case of pneumonia) that I speak of, I wouldn't at-

[1] Since plaintiff was not in El Paso until February 1920 (R. 33–34), this date is clearly erroneous.

> tempt to enumerate the symptoms at the time because I have no record of the case available. [Second parenthetical insert supplied.] (R. 107.)

Interrogated as to whether he deemed the condition which he found in 1920 to be of a temporary character, this witness answered: "I don't think so. The reason is, I examined Miss Hill again last year" (R. 108).

Dr. Long testified that he examined the plaintiff in November 1920, and that "I recall that she had very mild tuberculosis and heart lesion. * * * it would probably make her heart condition worse to engage in a strenuous exercise" (R. 102).

Dr. McGill testified that upon examination of the plaintiff in February 1919, during the year 1921, and on January 6, 1936, he found rales in the upper lobes of both lungs, sputum positive for tuberculosis, large heart, mitral regurgitation (R. 84), evening temperature, rapid pulse, low blood pressure, and cough (R. 85). He deemed the condition to be substantially the same each time he examined her. He testified that her heart condition has always been "so pronounced that even a novice could hear it" (R. 90); "That condition of her heart was so serious that we never expected the patient to get well" (R. 99); and that "the heart diseases were absolutely incurable and on account of these diseases it was very doubtful if the tuberculosis would ever be arrested. I don't think she could ever become cured of her tubercular con-

dition—I didn't think it then and I don't think it now" (R. 92).

This witness further testified that while a person with a slight leak of the heart may, by reason of compensation, lead a fairly active life, such compensation is not possible "with a person with as bad and as big a leak as this person had" (R. 95), and that if she attempted to work as a nurse, it would perhaps be fatal to her, or result in serious impairment of her health—"her condition was explained to her so she would understand why it was necessary to take a rest for months and months, years and years, if necessary" (R. 91).

Drs. Cohn, Welfield and Young, who examined the plaintiff in 1929, 1935, 1936, and 1937, testified, in substance, that they found her to be afflicted with a serious heart condition (R. 133, 181, 186). Dr. Cohn deemed this condition to be worse in 1935 than in 1929 (R. 133). Upon the basis of hypothetical questions assuming as true all of the evidence in the case excepting only the diagnoses of other doctors, each of these witnesses testified to opinions, in effect, that the plaintiff was suffering from a serious and incurable heart condition in February 1919, which would have been aggravated by work (R. 141, 183, 191–192). Drs. Young and Welfield expressly admitted that, in arriving at their opinions, they did not accept the findings shown in numerous medical reports introduced in evidence (R. 184, 202, 203–205). The testimony of Dr. Cohn was clearly to the same effect (R. 147).

There was testimony that plaintiff was ill en route from New York to Arkansas in January 1919 (R. 73), and that soon thereafter she consulted Drs. Kirby and McGill, personal friends with whom she had worked prior to service, who, she testified, treated her for her chest condition and upset stomach (R. 31). It was also in evidence that Dr. Kirby (who, plaintiff testified, died in 1922, R. 32) removed plaintiff's tonsils in May 1919 (R. 38). As heretofore pointed out, these doctors advised plaintiff to rest, but some two or three months after her return home, she engaged in her prewar occupation of nursing, and continued in such work being actually on duty one-third to one-half time until November 1919 (R. 32), when she went to Tucson, Arizona. Thereafter, until February 1920, her name was on call on the Nurses' Registry. She testified she did not respond to all calls because she "couldn't stand the work at all", and was actually on duty, she estimated, an aggregate of about two weeks between November 1919 and February 1924 (R. 34).

From Tucson she went to El Paso, Texas, in the latter part of February 1920, and with the exception of a few short absences, lived at El Paso until April 1922. During that period, she was in vocational training in X–ray work for six or seven months. She testified that portions of this work were too heavy for her, and that she did not "get along so well" (R. 34). Dr. Mason, with whom she took vocational training, testified that she was

not interested in X–ray work and since she did not care to learn it, her services were called for only when necessary (R. 249); that she was present practically all the time from 8:30 A. M. to 5:00 P. M. each day, and that "I do not recall any shortness of breath on her part" (R. 249); and that "she didn't give me the appearance of anyone that was suffering from an active tuberculosis or running a fever, or anything of the sort" (R. 250).

During vocational training, the plaintiff received maintenance allowance in the amount of $100.00 per month (R. 59).

Subsequent to her vocational training, the plaintiff took private cases as a nurse and, pursuant to call from the Nurses' Registry, upon which her name was kept, worked about two months in Globe, Arizona, during the latter part of 1922. This work was followed by a short period of rest, after which she took a position for one month in the Inspiration Hospital, quitting, she testified, because she couldn't stand the work (R. 38). For two months prior to November 1922 she worked in a hospital in Kingman, Arizona, again leaving, she testified, because she couldn't stand the work (R. 38). She then went to Phoenix, where, by reason of a severe cold, she refrained from work during the balance of the year 1922.

From January to July 1923 the plaintiff worked under the supervision of Dr. Wheeler in an Indian Sanitarium. She testified that her work was ir-

regular; that sometimes she was too weak and tired to get out of bed in the morning, but that she worked every day she could. She quit that work on Dr. Wheeler's advice that she take an extended rest (R. 39).

From October 1923 to April 1924, she was employed in the Smelter Hospital at Hayden, Arizona. She testified that although this was light work, she couldn't stand it any longer and quit (R. 40).

During the summer of 1924, she returned to Arkansas for a visit with her family, and passed a United States Civil Service examination, including a physical examination heretofore mentioned (R. 127–128), for a position in the Indian School Hospital. Pursuant thereto, she was employed in that position from September 1924 to February 1925. She quit, according to her testimony, because she couldn't stand the work (R. 41).

She testified that thereafter, until 1929, she took a few private cases, none of which lasted for more than one week; that she was ill and confined to her bed about four months during the winter and spring of 1928, and for a time during the winter of 1929. She estimated that her work from 1925 to 1929 aggregated four or five weeks each year (R. 43).

Bertha Case, who managed the Nurses' Registry upon which the plaintiff's name was kept from 1922 to 1929 (R. 113), testified that the plaintiff actually worked on calls from the Registry about

half-time, on an average, throughout these years (R. 114).

Florence Scales, under whose supervision the plaintiff worked upon occasions from 1923 to 1930 (R. 115), testified that she averaged about six months during each of these years (R. 118). Records of the Nurses' Registry show that, from November 10, 1929, to August 31, 1930, the plaintiff responded to thirteen different calls for duty (R. 265). The last assignment was to the Magna Copper Company Hospital (R. 265), where the plaintiff worked from September 1, 1930, to February 3, 1931 (R. 44).

Dr. Swackhamer, who worked at the hospital with the plaintiff during that time, testified that she was on duty continuously except for a 15-day absence to attend her brother's funeral in Arkansas, and that "Plaintiff received $100.00 per month with board and room, while employed by me; that her work was satisfactory and that she was receiving pay for the work she performed and for no other reason" (R. 285). During this period of work, Dr. Swackhamer examined the plaintiff and found an enlargement of the aorta in the left upper chest, prognosis fair, "nothing serious, provided she did not attempt to do too much work." The reason for his examination, he testified, was that the "plaintiff was complaining a little" (R. 284).

Since her discharge from service, the plaintiff has received hospital treatment for about three months in 1920 (R. 46), and for about eight months in 1931 (R. 45). In addition to $100.00 per month which she received during her vocational training, the plaintiff has received from sources other than earnings or gifts (presumably compensation, although the record does not so state), $1,371.46 between February 14, 1919, and June 30, 1923; $148.39 on October 22, 1926; and $50.00 per month since October 1926 (R. 321). She made her first claim of total permanent disability at discharge on June 18, 1931, and testified "that is the first time I knew I had a right to assert a claim" (R. 47).

ARGUMENT

We submit that there is no substantial evidence on the basis of which reasonable men, uninfluenced by prejudice, speculation, or sympathy, could find that the plaintiff herein was totally and permanently disabled in 1919, within the meaning of that term as defined in numerous decisions of the Supreme Court and the United States Circuits Courts of Appeals. The Circuit Court of Appeals for the First Circuit has said, concerning the phrase "total permanent disability":

> They are powerful words carrying a high content of meaning which perhaps has not always been fully recognized in cases of this character (*United States* v. *Alvord,* 66 F.

(2d) 455, 457 (C. C. A. 1st), certiorari denied, 291 U. S. 661).

The plaintiff is an intelligent, professionally trained person who has claimed and received the gratuitous benefits provided for veterans having a partial disability (R. 59, 267, 321), and who qualified for a Civil Service position (R. 40–41). Moreover, she is shown to have been in receipt of other income, obviously including compensation for arrested tuberculosis,[2] making it financially unnecessary for her to engage in strenuous activities in earning a livelihood.

Despite the familiarity she has shown with the gratuities provided by the Federal Government, and the opportunities for full insurance information afforded by her activities and associations since her service, she offers no other explanation for the long delay in the assertion of her present claim (first made in 1931) than lack of knowledge (R. 47). Cf. *Miller* v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734, in which the Supreme Court, citing *Lumbra* v. *United States,* 290 U. S. 551, stated:

> His long delay before bringing suit is wholly incompatible with a belief on his part that he was totally and permanently disabled during the period while his policy was in force. *Id.,* p. 560; *United States* v. *Hairston,* 55 F. (2d) 825, 827. If petitioner thought him-

[2] Section 202, Subsection 7, World War Veterans' Act (38 U. S. C. 480).

> self totally and permanently disabled, it is difficult to understand why he waited twelve years before attempting to assert his rights. The only explanation he makes for his delay is that he thought a man had to die to get the insurance. How he discovered his error after the extraordinary lapse of time indicated above we are not told. He was intelligent, had completed the third grade at high school, and a year at military school. It does not seem possible that he had never read the policy, which so plainly insures against total permanent disability. In the light of all the circumstances, his explanation is not credible (pp. 441–442).

And see *Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th).

For nearly twelve years subsequent to the date upon which she now claims to have become totally permanently disabled, the plaintiff was engaged in the active practice of her profession, representing by the maintenance of her name on the Nurses' Registry that her services were available to the public. Moreover, it was shown that she was called for and responded to duty with that degree of regularity reasonably to be expected in the course of such professional practice, as distinguished from salaried employment. It may be assumed that due regard for her health required periods of rest from the strenuous activities of nursing. Certainly this would be true of anyone in her profession. Moreover, if the periodic non-acceptance of calls, to

which she testified, be deemed other than the usual practice of private nurses, and is accepted as evidence even of total disability at such times, her case cannot thus be established, for the Supreme Court has stated:

> Periods of total temporary disability, though likely to recur at intervals, do not constitute the disability covered by the policy, for "permanent" means that which is continuing as contrasted with that which is "temporary" (p. 505) (*United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731).

Cf.:

> *United States* v. *Hansen,* 70 F. (2d) 230 (C. C. A. 9th), certiorari denied, 293 U. S. 604.
>
> *United States* v. *Timmons,* 68 F. (2d) 654 (C. C. A. 5th).
>
> *United States* v. *Hodges,* 74 F. (2d) 617 (C. C. A. 6th).

Whatever activity of tuberculosis the plaintiff may have had (and there is no showing that the involvement was ever extensive), there is an absence of any medical testimony of activity of the disease for many years during the period intervening between the date of claimed total permanent disability, and the date of trial, and her activities as a nurse, possessed of more than average medical knowledge, are wholly inconsistent with the belief on her part that she had a continuing active tuberculosis. The decisions denying recovery in war

risk insurance cases for incipient tuberculosis which has been, may be, or might have been arrested, are numerous. The following are typical:

Falbo v. *United States,* 64 F. (2d) 948 (C. C. A. 9th), affirmed per curiam, 291 U. S. 646.

United States v. *Walker,* 77 F. (2d) 415 (C. C. A. 5th), certiorari denied, 296 U. S. 612.

Grate v. *United States,* 72 F. (2d) 1 (C. C. A. 8th), certiorari denied, 294 U. S. 706.

United States v. *McShane,* 70 F. (2d) 991 (C. C. A. 10th), certiorari denied, 293 U. S. 610.

United States v. *McRae,* 77 F. (2d) 88 (C. C. A. 4th), certiorari denied, 295 U. S. 759.

United States v. *Reeves,* 75 F. (2d) 368 (C. C. A. 6th).

Robinson v. *United States,* 87 F. (2d) 343 (C. C. A. 2nd).

United States v. *Hammond,* 87 F. (2d) 226 (C. C. A. 5th).

United States v. *Rentfrow,* 60 F. (2d) 488 (C. C. A. 10th).

Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

The record of the plaintiff's disability during the years since 1919 established conclusively, we submit, that her heart condition—of whatever nature it may have been during the life of her insurance contract—did not then constitute a total permanent disability. Not only was her heart found to be normal upon repeated physical examinations by Government doctors, but an examina-

tion by a surgeon selected by her to perform a major operation in 1927 revealed a normal heart, upon the basis of both history and physical findings. In accordance with the usual precautionary routine of competent physicians. Dr. Palmer made a thorough examination, including an X-ray of the chest, because "her case history showed that she stated she had had a cough at one time" (R. 274, 275). His findings were concurred in by Dr. Brockway,[3] who had then treated her for six weeks, and who assisted with the operation (R. 275, 316). Moreover, these findings by her physicians were confirmed, we submit, by the absence of complications despite the use of a general anesthetic, and the rapid and complete recovery of the plaintiff (R. 275).

Furthermore, it is incredible that the plaintiff, with the knowledge of her own condition necessarily incident to her profession, would have submitted to a major operation without disclosing the fact of an existing heart condition, or of active or recently arrested tuberculosis, and while her testimony shows that she has been aware of her lung condition since 1919, it makes no reference to a heart disability. Indeed, she testified that Drs. McGill and Kirby treated her only for her lung disability and upset stomach (R. 31).

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[3] Dr. Brockway was not called to testify, although he was living in Phoenix at the time of the trial (R. 58). Cf. *United States* v. *Blackburn*, 33 F. (2d) 564 (C. C. A. 9th).

The testimony of Dr. McGill and Dr. Sharp, although based upon memory after the lapse of many years (Cf. *Cunningham* v. *United States,* 67 F. (2d) 714 (C. C. A. 5th)), may be deemed to warrant a finding that the plaintiff had a heart disability in 1919, but their opinion testimony that it was then permanent, was conclusively shown to be erroneous, and should therefore be disregarded. Cf. *United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731. And see, *United States* v. *Mintz,* 73 F. (2d) 457 (C. C. A. 5th). See also, *United States* v. *Doublehead,* 70 F. (2d) 91, 92 (C. C. A. 10th), in which the court stated that:

> Liability upon an insurance contract cannot be created by a doctor's opinion.

The opinion testimony of Drs. Cohn, Welfield, and Young that plaintiff had a serious heart disability in 1919, was a clear invasion of the province of the jury, since each of these witnesses freely admitted that he had weighed the evidence and rejected certain portions thereof. Cf. *United States* v. *Stephens,* 73 F. (2d) 695 (C. C. A. 9th). Although admitted without objection, opinion testimony of this character has no probative value (Cf. *Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th)), and its admission in evidence constitutes reversible error *per se.* *United States* v. *White,* 77 F. (2d) 757 (C. C. A. 9th).

CONCLUSION

It is respectfully submitted that the trial court erred, and that the judgment should be reversed.

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